85-1944

Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY D. MARABLE,
Specialist Four, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER defense counsel's advice to the petitioner to plead guilty to avoid the death penalty violates petitioner's sixth amendment right to counsel when it was clear from *Furman v. Georgia* and its progeny that the procedure for adjudging the death penalty under the Uniform Code of Military Justice, art. 118 was clearly unconstitutional.

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- Draft version 6

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ANTHONY D. MARABLE,
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v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Anthony D. Marable, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ——M.J.—— (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 444726 (A.C.M.R. 31 October 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 31, 1986, affirming petitioner's conviction dated July 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Uniform Code of Military Justice provides:

Article 27, 10 U.S.C. § 827 (1982) (Appendix C)

Article 118, 10 U.S.C. § 918 (1982) (Appendix D)

STATEMENT OF THE CASE

On May 6, 1983, Private First Class (PFC) Dwayne K. Jefferson, Specialist Four (Sp4) Adolphus A. Morris, and petitioner planned to rob a cab driver near Finthen, Federal Republic of Germany. The three soldiers agreed that PFC Jefferson and petitioner would take Jefferson's .357 magnum revolver into the taxi, direct the driver to another location, and rob the driver. Specialist Morris would follow the taxi in a car and pick up PFC Jefferson and petitioner after the robbery.

At about 0100 hours on May 7, 1983, PFC Jefferson and petitioner entered the taxi of Ernst Alex Walla. Jefferson sat in the front seat of the cab and petitioner sat in the back seat. A struggle ensued between PFC Jefferson and the driver during which the petitioner shot the driver twice in the head with the .357 magnum revolver.

On May 13, 1983, the government preferred a felony murder charge against the petitioner. On July 12, 1983, the convening authority referred this case as capital, to a general court-martial. Prior to trial, petitioner and the convening authority entered into a pretrial agreement wherein petitioner agreed to plead guilty, enter into a stipulation of fact, and testify at the courts-martial of PFC Jefferson and SP4 Morris. In exchange,

the convening authority agreed to revoke the capital referral and re-refer petitioner's case as noncapital. (Appellate Exhibits III and IV).

The question presented in this petition was litigated at the Court of Military Appeals. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HE WAS ADVISED TO ENTER INTO A PRETRIAL AGREEMENT WHEREIN HE AGREED TO PLEAD GUILTY TO MURDER, TO ENTER INTO A STIPULATION OF FACT AND TO TESTIFY AGAINST TWO COACTORS IN SOLE CONSIDERATION THAT THE GOVERNMENT WOULD NOT REFER THE CASE AS CAPITAL UNDER PROVISIONS WHICH WERE CLEARLY UNCONSTITUTIONAL.

REASONS FOR GRANTING THE WRIT

In advising the petitioner to plead guilty to avoid the death penalty some eleven years after this Court had struck down similar statutes, the petitioner was denied the effective assistance of counsel as guaranteed by the United States Constitution.

I. The Provisions Within the Military for Adjudging the Death Penalty Were Clearly Unconstitutional at the Time of the Appellant's Court-Martial in View of This Court's Decisions During the Previous Eleven Years.

Within three months of petitioner's court-martial,[1] the Court of Military Appeals held that the procedures for

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[1] Prior to this, the Army Court of Military Review had upheld the death penalty provision within the military. United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982). However, the Air Force Court of Military Review had struck down the death penalty provision within the military. United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1983).

imposing the death penalty in the military judicial system under the Uniform Code of Military Justice [hereinafter cited as UCMJ], art. 118, 10 U.S.C. § 918 (1982), were constitutionally deficient. *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). This decision was based on a series of cases which held that in order to pass constitutional muster, the procedures used to impose the death penalty must clearly articulate restrictive guidelines which inform and aid in the exercise of sentencing discretion. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Within the military, the death penalty is not authorized unless the convening authority specifically refers the case as capital. The convening authority originally referred this case as capital, but following the negotiations for a guilty plea, he re-referred the case as noncapital. At trial, the petitioner pleaded guilty to felony murder, UCMJ, art. 118(4). Thus, pursuant to his plea, the petitioner was found guilty of an offense for which a mandatory life sentence was imposed.

At the time of petitioner's court-martial, the provisions for imposing the death penalty under the UCMJ, art. 118, provided no guidelines for consideration in sentence deliberations. Rather, the provisions reserved unlimited discretion to the sentencing authority. Furthermore, UCMJ, art. 118 provided no standards for restricting the group of individuals subject to the death penalty, nor standards for weighing various aggravating and mitigating factors. Additionally, appellate review was not meaningful, since the law did not require the sentencing authority to identify the aggravating factors considered. The UCMJ, art. 118, was nearly identical to

the federal and state statutes which had been invalidated eleven years earlier by *Furman* and its 117 companion cases. These broad and sweeping decisions "eviscerated the death penalty provisions of every pending Federal and state death sentence in the United States." *United States v. Gay*, 16 M.J. 586, 589 (A.F.C.M.R. 1983).

Although neither *Furman* nor any of the companion cases directly concerned the military death penalty, the applicability of the constitutional principles involved could not be ignored in any assessment of the continued vitality of article 118. Dissenting opinions by Justices Powell and Blackman in *Furman*, in which Justice Rehnquist and the Chief Justice joined, suggested that the death penalty provisions of the UCMJ were also invalidated under the holding of *Furman*. *Furman v. Georgia*, 408 U.S. at 417-418 (Powell, J., dissenting); 408 U.S. at 412 (Blackmun, J., dissenting). Although these statements are clearly dicta, they are of immense importance in any subsequent assessment of the continued validity of the provisions of UCMJ, art. 118 for imposing the death penalty.

Furthermore, other decisions, although not directly resolving this issue, support the conclusion that UCMJ, art. 118, would not pass constitutional scrutiny. In *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973), *aff'd*, 419 U.S. 256 (1974), the District of Columbia Court of Appeals addressed the issue of whether *Furman* invalidated the life sentence with no parole recommendation of the President in his commutation of a court-martial imposed death sentence. The court assumed that *Furman* voided the military death penalty under UCMJ, art. 118 and stated that if Schick had been under penalty of death at the time of *Furman*, it would have been an illegal sentence which must be set aside. This Court affirmed the circuit court decision, but declined to address the specific issue of whether *Furman* applies to the military. However, a dissenting opinion by Justice

Marshall, in which Justices Douglas and Brennan joined, specifically noted that a military death sentence would be unconstitutional in light of *Furman*. *Schick v. Reed*, 419 U.S. at 271.

Prior to petitioner's court-martial at least one military service had recognized *Furman's* impact on UCMJ, art. 118. In *United States v. DeChamplain*, 46 C.M.R. 784 (A.F.C.M.R. 1973), the Air Force Court of Military Review noted that *Furman* "raises doubt as to the validity of imposing the death sentence under any circumstances" *Id.* at 791, n. 5. Shortly before appellant's court-martial, the Air Force Court of Military Review, sitting *en banc*, ruled that the death penalty provisions of UCMJ, art. 118 failed to provide objective standards to limit the discretion of the court-martial as required by *Furman* and its progeny and, therefore, could not pass constitutional muster. *United States v. Gay*, 16 M.J. at 594. Additionally, on at least five separate occasions, military trial judges had treated referred capital cases as noncapital on the basis that the sentencing provisions of UCMJ, art. 118 did not comply with *Furman*. 16 M.J. at 594, n. 24.

Finally, the military legal establishment realized UCMJ, art. 118's deficiencies when compared with the *Furman* standards. In an attempt to correct these deficiencies, the military, at the time of appellant's court-martial, was revising the death penalty provisions to expressly incorporate the *Furman* requirements. The draft version of the *Manual for Courts-Martial, 1984*, contained the restrictive guidelines and procedures needed to conform to *Furman*. Thus, there was notice to defense counsel that a sentence to death, if imposed, would ultimately be set aside on appeal in accordance with *Furman*.

II. This Court Has Established a Standard of Competence Required of All Defense Counsel in the Representation of an Accused.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court issued guidelines for considering claims of ineffective assistance of counsel under the sixth amendment. In *Strickland* this Court held that:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

466 U.S. at 686. The Court went on to explain that a claim of ineffective assistance has two components:

> First, the defendant must show counsel's conduct was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense.

466 U.S. at 687. The Court stated that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." 466 U.S. at 693. However, the "defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. This Court rejected the notion that a defendant must show a different result would have occurred if the errors had not been made, in favor of a test that examines the trial as a reliable measure of guilt. If the mechanism of the trial is rendered unreliable by the error, then prejudice occurs.

In *Hill v. Lockhart*, 54 U.S.L.W. 4006 (U.S. Nov. 19, 1985), this Court applied the *Strickland* standard to a guilty plea situation, stating that:

> In the context of guilty pleas, ... The second, or "prejudice," requirement, on the other hand, focuses

> on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. [footnote omitted]

54 U.S.L.W. at 4008. The long-standing test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Id.*

An accused facing court-martial is entitled to the effective assistance of counsel. United States Constitution, Amendment VI; UCMJ, art. 27, 10 U.S.C. § 827 (1982); *United States v. Rivas*, 3 M.J. 282, 287 (C.M.A. 1977). The Court of Military Appeals has held that the assistance of counsel is considered effective if it reflects the customary skill and knowledge prevalent among criminal attorneys. 3 M.J. at 288. This level of competence must be exercised "without omission" throughout the trial. *United States v. Rivas*, 3 M.J. at 289. *See also United States v. Jefferson*, 13 M.J. 1, 5 (C.M.A. 1982). The military standard allows relief for a single prejudicial act of incompetence. *United States v. Allen*, 8 C.M.A. 504, 25 C.M.R. 8 (1957); *United States v. Walker*, 3 C.M.A. 355, 12 C.M.R. 111 (1953).

III. The Advice of Defense Counsel in the Case at Bar Was Deficient and Fell Below the Objective Standard of Competence Required Where Defense Counsel Advised Petitioner to Plead Guilty to Avoid the Death Penalty When the Procedures for Imposing the Death Penalty Were Clearly Unconstitutional.

The benchmark for judging a claim of ineffectiveness of counsel is whether the conduct complained of undermined the proper functioning of the adversarial process which the trial must necessarily rely on to produce a just result. *Strickland v. Washington*, 460 U.S. at 686. Thus,

courts must determine whether the representation of the petitioner in this instance fell below the objective standard of skill and knowledge reasonably demanded of criminal attorneys. The petitioner submits that ignorance or complete disregard of the effect of *Furman* and its progeny on the constitutionality of UCMJ, art. 118, fails to meet the standard of competence demanded by this Honorable Court and the sixth amendment.

The paramount case on the coercive influence of the threat of a death penalty provision which is subsequently deemed unconstitutional is *Brady v. United States*, 397 U.S. 742 (1970). Brady pleaded guilty in 1959 to a violation of the federal kidnapping statute. The statute provided that the death penalty could be imposed only by a jury. If the defendant waived a jury trial in favor of trial by judge alone, the death penalty could not be adjudged.

In *Brady* this Court addressed the issue of whether an accused was adequately represented when he was advised to plead guilty to avoid the potential imposition of the death sentence which, at the time, was unquestionably valid. The Court held that where later pronouncements of the courts would render the attorney's advice incorrect, the attorney's representation was not ineffective where he "correctly advised him with respect to the then existing law as to possible penalties . . ." 397 U.S. at 757. In *Brady* the judicial determination that the provisions were unconstitutional occurred nine years after the advice. In marked contrast, the petitioner in this case was faced with the threat of the death penalty which the defense attorney should have known would not likely be upheld even if it were imposed.

The constitutional requirements which any sentence to death must contain had been expressly enunciated by the Supreme Court in *Furman*, eleven years before appellant's court-martial. Additionally, a majority of the justices on the Supreme Court had made specific comments

that the death penalty provisions of the UCMJ were constitutionally deficient. Finally, one military court had invalidated the death penalty and this very issue was pending before the Court of Military Appeals at the time of petitioner's court-martial. Any reasonable analysis of these opinions would show that the military death penalty provisions would not survive a challenge on constitutional grounds. However, petitioner's defense counsel did not advise him that the military procedures were constitutionally deficient and that a sentence to death would not survive on appeal even if adjudged. Rather, his trial defense counsel led him to believe that if he contested his guilt, there was a distinct possibility that the death penalty would be affirmed on appeal. Thus, because of the incorrect and incomplete advice by this trial defense counsel, petitioner felt compelled to plead guilty to avoid the death sentence. Such a decision, based on counsel's erroneous advice cannot be viewed as a knowing and intelligent waiver of constitutional rights. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 236-238 (1973).

In advising petitioner to enter a pretrial agreement and to plead guilty to murder, trial defense counsel obtained no substantive benefit for the petitioner in return. Through this pretrial agreement, petitioner was bound to plead guilty, to enter into a stipulation of fact admitting his involvement in the offense, and to testify against his accomplices. In exchange for the very substantial rights and benefits which he surrendered, petitioner received consideration which is at best illusory. By pleading guilty to an offense which carried a mandatory minimum sentence of life imprisonment, petitioner found himself in a position where he was no better off than if he had pleaded not guilty. Even if convicted, despite his pleas, any sentence to death which may have been adjudged would have been set aside by reviewing authorities in accordance with *Furman*.

IV. The Petitioner Was Prejudiced by the Ruling of the Court Below.

The petitioner was entitled to be represented at trial by competent defense counsel who would have adequately advised him of the effect of *Furman* on the constitutionality of UCMJ, art. 118. With competent counsel, he would not have entered into a guilty plea and waived substantial constitutional rights.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, and the denial of substantial rights, the petition for certiorari should be granted. The question presented is substantial and of crucial significance.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS
USCMA Dkt. No. 51308/AR
CMR Dkt. No. 444726

UNITED STATES,
Appellee,

v.

ANTHONY D. MARABLE (487-78-6067),
Appellant.

ORDER

On further consideration of the granted issue, 20 M.J. 368, in light of *Brady v. United States*, 397 U.S. 742 (1970), it is by the Court this 31st day of March 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (HOLMES, Esq.)
Appellate Government Counsel (HOADLEY)

APPENDIX B

UNITED STATES ARMY
COURT OF MILITARY REVIEW
Before
MARDEN, PAULEY and WERNER
Appellate Military Judges

CM 444726

UNITED STATES,
Appellee,

v.

Specialist Four ANTHONY D. MARABLE,
SSN 487-78-6067, United States Army,
Appellant.

HQ, 8th Infantry Div. (Mech)
J. C. Malinoski, Jr., Military Judge

Captain Harry L. Williams, Jr., JAGC, Captain Michael D. Graham, JAGC, and Richard L. Turner, Esquire, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Captain Samuel J. Rob, JAGC, and Lieutenant Colonel Thomas M. Curtis, JAGC, were on the pleadings for appellee.

31 OCT 1984

MEMORANDUM OPINION

Per Curiam:

The Court having found the approved findings of guilty and the sentence correct in law and fact, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are *AFFIRMED*.[1]

FOR THE COURT

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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[1] The issues presented herein are similar to those presented and discussed in the companion case of *United States v. Morris*, CM 444780 (ACMR 31 Oct. 1984) (unpub.).

APPENDIX C

Article 27, 10 U.S.C. § 827 (1982):

Detail of trial counsel and defense counsel

(a) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate. No person who has acted as investigating officer, military judge or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) The accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827 (b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account

of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

APPENDIX D

Article 118, 10 U.S.C. § 918 (1982)

Murder.

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

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